Testimony of Denise Noonan Slavin, President
National Association of Immigration Judges
Before the Subcommittee on the Federal Workforce and Agency Organization
Committee on Government Reform
"Fair and Balanced? The Status of Pay and Benefits for Non-Article III Judges"
May 16, 2006

Good afternoon Mr. Chairman and Committee Members. Thank you for inviting the National Association of Immigration Judges to testify. Pay compression has been an increasing problem in the ranks of the Immigration Judge Corps for some time, and we welcome the opportunity to explain how it affects our ranks and how important it is to address it.

Before I begin, I need to make clear that my testimony today is in my capacity as President of the National Association of Immigration Judges, and not as a representative of the United States Department of Justice. The NAIJ is a professional association of Immigration Judges, and the certified collective bargaining unit for Immigration Judges nation-wide. The NAIJ has been reaching out to lawmakers grappling with this topic for the last few years.

The unique position of Immigration Judges frequently has been overlooked because they comprise a relatively small body of specialized administrative judges with the Department of Justice. Immigration Court proceedings are a strange hybrid of administrative, civil, and criminal law. Although we are technically an administrative tribunal, we are not governed by the Administrative Procedures Act. However, we comprise perhaps one of the largest groups of "administrative judges" within the federal bureaucracy. Unlike ALJs, we generally render final agency decisions, not mere recommendations. The vast number of our decisions is not appealed. The subject matter we address daily can have life-or-death impact on the parties before us, either in the context of asylum claims or claims involving assertions that removal will cause exceptional and extremely unusual hardship to United States citizen relatives. More often recently, cases have raised significant national security issues and assertions of connections to international terrorism or persecution of others abroad. Further, the increased spotlight on immigration issues and IJ decisions brought on by 'streamlining" –the process of the Board of Immigration Appeals adopting IJ decisions as the final agency decision – has highlighted the need for a seasoned and stable corps of IJs.

I understand the Committee's emphasis has been on Administrative Law Judges (ALJs), but Immigration Judges (IJs) have similar problems because of pay compression. These include the serious problems of attrition in the ranks and salaries disproportionate to those of the attorneys and parties who appear before them. Our ranks have been more directly affected by pay compression in recent years. Increasingly, the Department has not been able to fill positions as IJs leave, creating a burden on the system and sitting IJs. The increased focus on immigration issues in the press only highlights the need to recruit and retain a high caliber candidate for IJ positions.

The current IJ pay scale is governed by Public Law 104-208, Section 371(c), as amended by Section 1125(c)(4) of the National Defense Authorization Act for Fiscal Year 2004. This scale set up a schedule of four levels of pay, based on increasing years of experience. However, in over one third of the cities which IJs sit, the pay levels for the two highest positions are the same due to pay compression. At present, over100 Immigration Judges, about half of the corps, are paid identical salaries because of the pay cap provisions which limit the amount of locality augmentation they can receive. The ubiquity of this compression is exacerbated for IJs in high locality pay areas such as New York, Los Angeles, and San Francisco, as they must forgo part of their locality pay adjustment (losing actual salary to which they would otherwise be entitled) in order to comply with the overall salary cap applicable under our present pay structure.

This pay compression has occurred because the IJ pay scale has been linked to another pay scale. IJs initially were paid on the attorney-scale at the Department of Justice, but Congress recognized the need to set up a different scale for IJs in 1996. The new IJ pay scale was initially linked to the SES level II, because of the precedent of highly paid government workers being promoted to the SES pay scale after working their way through the GS system, and because of the fact that the actual dollar amount of pay was appropriate for experienced attorneys in our positions of responsibility. The "pay marker" was changed to the Executive Level II salary by the National Defense Authorization Act for Fiscal Year 2004, to safeguard IJ pay from being impacted by the implementation of performance evaluations for SES employees in that same act. Of course, pay compression is aggravated by the fact that, for the same reason they are exempt from performance reviews, IJs cannot receive other types of federal compensations, such as bonuses that any agencies annually award their SES members. Similarly those employees who are paid through the Executive Schedule frequently benefit from additional financial or non-financial perks which IJs do not qualify to receive.

Historically, IJs have been specifically exempted from the general federal employment performance review system by OPM in recognition of the quasi-judicial nature of the job and the need for both real and perceived decisional independence. The NAIJ would be happy to work with the Subcommittee to change the pay scale, but NAIJ cannot envision a system that would link pay to performance and still preserve public confidence. We would suggest that, in the best of all worlds, non-Article III Judge pay be linked, although at a reduced percentage, to the salaries of Bankruptcy Judges or Magistrate Judges, which are more comparable positions.

In any event, any new pay system cannot include a "pay for performance" model. Judicial independence is paramount to assure that we maintain public confidence in the neutrality and fairness of our tribunal, and the mere appearance that quantity-based measures are applied or, worse yet, financially rewarded, would severely undermine that confidence. Indeed, many IJs believe that the isolated incidents of IJ intemperance occasionally criticized in the press, has been brought on by the Department of Justice's impositions of "case performance goals" on IJs. These "goals" have dictated rigid guidelines to IJs for the time frame of completion of cases based on the case "type"and/or age. Immigration Judges routinely have four full hearings scheduled each day to determine the merits of a claim for relief from deportation, such as

asylum, and are expected to render oral decisions from the bench on each case, with little time for reflection. We are charged with applying a complicated and frequently amended governing statute which has repeatedly been acknowledged as second only to the tax code in its legal complexity. With added emphasis in the last few years on case completion goals with do not have the time in court to exchange pleasantries or allow an applicant to take all the time they desire for their "day in court." We cannot always rely on the attorneys who appear before us to keep the case on track, for relevant information, and thus sometimes appear abrupt or curt in order to move cases along. It is not difficult to see how this pressure to expeditiously move cases through the system might be misconstrued and misinterpreted as a lack of courtesy by the party. Yet it is the same press of cases which highlights the need for expert and experienced IJs and serves to underscore the crucial importance of maintaining a top quality corps of seasoned IJs by addressing pay compression and inequities relative to private sector employment.

The public deserves an Immigration Judges corps of the most knowledgeable and professional people in the field. However, it is vital that the public perceive Immigration Judges as a neutral check-and balance in a system which provides due process to the parties. This requires both decisional independence and the continuity of an experienced corps of professionals.

The important, independent role of IJs in post 9/11 times, and the pay compression from which we suffer, demand that our positions be addressed in a manner similar to any proposal for ALJs or other non-Article III Judges. The statutory language must be clear to ensure the pay scale for IJs is appropriately modernized, that compression be alleviated, and that it be clearly protected from any link to performance-based criteria. It has been recognized that IJs need to operate in an impartial manner, and to assure the public that this is so, an objective and fair salary is essential. More and more, we are vulnerable to losing our seasoned judges as professional salaries outside the government sector rise and ours remain stagnant due to the pay cap to which we are subject. We fear that in the future, the lack of a competitive salary with appropriate opportunities for augmentation and meaningful locality adjustments will inhibit the ability of the Immigration Court to attract and keep the best and the brightest. Therefore, we strongly urge that you take action to treat IJ salaries comparably to that of ALJs and other non-Article III judges and that the adverse affects of pay compression and pay caps be ameliorated.

Thank you again for this opportunity.